UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

WARREN UNILUBE, INC.

and Case No. 26-CA-23910

TEAMSTERS, LOCAL UNION NO. 667

RESPONDENT'S REPLY IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to 29 C.F.R. § 102.46, Respondent Warren Unilube, Inc. ("Warren Unilube") submits this reply brief in support of its Exceptions to the Decision of Administrative Law Judge Robert A. Ringler (the "ALJ") (the "Decision") and in reply to Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions ("Answering Brief").

ARGUMENT/ANALYSIS

I. WARREN UNILUBE DID NOT VIOLATE THE ACT IN ISSUING THE NOVEMBER 16, 2010 NOTICE REGARDING CELL PHONE AND RADIO USE.

A. Warren Unilube Had No Duty to Bargain with the Union Regarding the November 16, 2010 Notice Because the Union Did Not Demand Bargaining Until November 22, 2010.

In Warren Unilube's Brief in Support of Respondent's Exceptions to the Decision of the Administrative Law Judge ("Warren Unilube's Brief"), Warren Unilube submitted that it had no duty to bargain with the Teamsters, Local Union No. 667 (the "Union") regarding the November 16, 2010 notice addressing cell phone and radio use because the Union did not demand bargaining until well after that notice was issued. (Warren Unilube's Br. at 12-15.) In response, the Acting General Counsel attempts to distinguish between the duty to bargain regarding the terms of a collective bargaining agreement and the duty to bargain regarding unilateral changes,

apparently implying that the former requires a demand to bargain while the latter does not. (See Answering Brief at 10-12.) The Acting General Counsel, however, does not cite to any authority that would support this false dichotomy. Indeed, either an employer has a duty to bargain or it does not, and that duty to bargain does not arise until the union has made a demand to bargain. Wal-Mart Stores, Inc., 348 NLRB 274, 290 (2006) ("In general, an employer's duty to bargain with a union begins when two things happen: First, a union must obtain the support of a majority of employees in a unit appropriate for collective bargaining. **Second, after obtaining such majority status, the union must make a demand to bargain; at that point, the employer has a duty to recognize the union and bargain with it**") (emphasis added).

The Acting General Counsel tries to distinguish Wal-Mart, claiming the quoted language "merely details the point at which an employer is obligated to engage in bargaining with a union concerning a collective bargaining agreement." (Answering Br. at 11.) Wal-Mart, however, contains no language limiting its application to bargaining regarding a collective bargaining agreement; indeed, Wal-Mart dealt with bargaining regarding a unilateral change. If there is a key difference between Wal-Mart and this case, it is that, in Wal-Mart, the union **had** requested bargaining prior to the employer making the unilateral change. See Wal-Mart, 348 NLRB at 290. Here, the Union did not request bargaining until November 22, 2010, nearly a week after Warren Unilube issued the November 16, 2010 notice, and Warren Unilube simply had no duty to bargain until that request was made. See id.; San Miguel Hospital Corp., 352 NLRB 809, 809-10 (2008) (finding the employer violated the Act by failing to bargain with the union beginning not on the date of the election or the union's certification, but on the date the union requested bargaining). Warren Unilube thus did not violate the Act in issuing the November 16, 2010 notice, and the ALJ's Decision to the contrary should be reversed.

B. Warren Unilube Did Not Unilaterally Change the Terms and Conditions of Its Employees' Employment Because the November 16, 2010 Notice Was Merely a Re-iteration of Existing Policy.

In attempting to dispute Warren Unilube's position that it also did not violate the Act in issuing the November 16, 2010 notice because that notice did not represent a change in the terms and conditions of the employees' employment, but was consistent with existing Warren Unilube policies, the Acting General Counsel simply quotes the ALJ's Decision. (Answering Br. at 13.) The Acting General Counsel does not address any of the undisputed evidence that the ALJ blatantly ignored in rendering his Decision. (See Warren Unilube's Br. at 15-17.)

Most notably, the Acting General Counsel completely ignores (as did the ALJ) the undisputed fact that, since 2003, Warren Unilube has consistently maintained a policy in its Employee Handbook flatly prohibiting **all** personal telephone calls (whether by cell phone or otherwise) other than during work breaks. (See GC-8 at 23.) This policy is substantively consistent with the November 16, 2010 notice, such that the November 16, 2010 notice did not constitute a "change" in existing policy. (GC-4.)

The Acting General Counsel also ignores (as did the ALJ) the testimony of Annie Morris, its own witness. Morris specifically testified that she had seen a notice posted well before the Union election in November of 2010, and perhaps as early as 2007, stating that: "UNAUTHORIZED USE OF CELL PHONES IS PROHIBITED IN THE FACILITY; You may use your phones at breaks and lunch in authorized areas." (R-5A; R-5B; Tr. (Morris Test.) at 77-80, 90-92.) This notice was also substantively consistent with the Employee Handbook and the November 16, 2010 notice. The Acting General Counsel also ignores Morris' testimony that she knew that "we were only supposed to use our cell phones when we in break [sic]," testimony that Morris altered to describe a less restrictive policy ("we shouldn't use our cell phones while we

were operating machinery") only after counsel for the Acting General Counsel asked Morris the same question three times regarding her understanding of the policy. (Tr. (Morris Test.) at 46-47.) In fact, the Acting General Counsel not only ignores Morris' testimony on these two points, he blatantly mischaracterizes it to the Board, claiming, "employees Morris and Howard, who worked in shipping, testified that they were only aware of the policy prohibiting use of cell phones while operating equipment."[1] (Answering Br. at 3-4.) In short, Warren Unilube has long had in place a policy prohibiting **all** employees from using telephones except during breaks. As such, the November 16, 2010 notice did not constitute a "change" in that policy.

Similarly, the November 16, 2010 notice's prohibition against radio use was consistent with the Employee Handbook's provision that Warren Unilube will "[i]dentify[] potential hazards and establish[] necessary protective measures." (GC-8 at 32.) This is exactly what Warren Unilube did in identifying radio use as a potential safety hazard and narrowly restricting the use of radios where such use could pose a safety issue. (Tr. (Johanyak Test.) at 245-246.)

Because the November 16, 2010 notice was consistent with existing Warren Unilube policy, it did not constitute a "change" in that policy, and Warren Unilube thus had no obligation to bargain with the Union regarding that notice.

C. Even if the Challenged Notice Had Constituted a Unilateral Change, Any Change Was Not Sufficiently Material or Significant to Require Bargaining.

The Acting General Counsel also fails to meaningfully dispute Warren Unilube's position that even assuming the November 16, 2010 notice constituted any sort of a change, the purported

[1] Even assuming that Morris and Howard had so testified, there is no basis for the Acting General Counsel to extrapolate the testimony of those two witnesses (both of whom worked in one specific area – the AutoZone dock – of one specific building – the Phoenix building) to apply to the entirety of Warren Unilube's sprawling, multi-building, multi-department facility. (See Tr. (Morris Test.) at 43; (Howard Test.) at 94-95; (Brown Test.) at 135-138; R-1(g).)

change was not material or significant such that bargaining was required. See Berkshire Nursing Home, LLC, 345 NLRB 220 (2005); Crittenton Hospital, 342 NLRB 686 (2004). The cases relied upon by the Acting General Counsel are simply not relevant to this case.

For example, in Vanguard Fire & Supply Co., Inc., 345 NLRB 1016 (2005), the employer began enforcing a pre-existing policy requiring employees to pay for any cell phone usage that exceeded a given number of minutes, such that the change had a financial impact on the employees. Vanguard, 345 NLRB at 1017, 1028 ("[r]educing an employee's pay by this amount certainly would constitute a material, substantial and significant change in terms and conditions of employment"). Here, any alleged change in policy had no financial impact upon employees, nor did it have any impact upon employees' wages, benefits, hours or job duties.

Further, the Board found there to be a change in Vanguard primarily because the employer began enforcing an existing policy that was previously not enforced. Vanguard, 345 NLRB at 1017. In this case, Warren Unilube has enforced its pre-existing cell phone policy, both through formal, written warnings when warranted, and also through informal warnings to employees (an undisputed fact ignored by the ALJ and the Acting General Counsel).[2] (GC-7;

[2] The Acting General Counsel claims that "[t]he employees who received discipline [under the pre-existing cell phone policy] were all classified as production employees working in departments overseen by Production Manager Black." (Answering Br. at 5.) In addressing the fact that one employee who received a written warning was a Blow Molding employee, (see Warren Unilube's Br. at 6 (citing GC-18); see also GC-19), the Acting General Counsel claims that "Plant Manager Rusty Brown specifically acknowledged that the employee in question worked on a production line." (Answering Br. at 5.) The Acting General Counsel, however, confuses the nature of the equipment that the Blow Molding Department employee worked on with the actual department in which he was employed. The Acting General Counsel's own exhibit confirms that the employee worked in the "Blow Mold" Department, as opposed to the "Production" Department. (Cf. GC-19 (identifying department as "Blow Mold") with GC-12, GC-14 (identifying employees' department as "Production").) Thus, the evidence establishes that employees outside of the Production Department were in fact disciplined well prior to November of 2010 for violation of the pre-existing cell phone policy.

GC-11; GC-13; GC-15; GC-16; GC-18; Tr. (Brown Test.) at 191-92; (Black Test.) at 210-12.) Further, to the extent the Acting General Counsel claims (despite the evidence) that the previous policy was not enforced or was enforced inconsistently, the Acting General Counsel states that "no employee has received any written discipline for violation of the [November 16, 2010] policy" and that employees continue to use their cell phones without discipline. (Answering Br. at 8.) As such, even accepting the Acting General Counsel's interpretation of the evidence, there has been no change in Warren Unilube's enforcement of its cell phone policy.

Finally, even assuming that there has been any change in Warren Unilube's enforcement of its cell phone policy, the requirement that employees make personal telephone calls only during breaks (rather than during working time when they are expected to be working) is at most an inconvenience. In this regard, the Board has held that "a relatively minor inconvenience to the employees [is] not a statutorily cognizable change in their terms and conditions of employment." Berkshire Nursing Home, LLC, 345 NLRB 220, 220 (2005). Therefore, regardless of how the Acting General Counsel characterizes the facts, it is evident that there has been no substantial and material change as a result of the November 16, 2010 notice.

Pan American Grain Co., 343 NLRB 205 (2004), also cited by the Acting General Counsel, is similarly irrelevant. In Pan American Grain, the employer specifically admitted that it did not previously have a policy governing cell phone use. Pan American Grain, 343 NLRB at 213. Such is certainly not the case here – Warren Unilube has had a policy prohibiting all telephone use (whether cell phone or otherwise) other than on breaks since 2003, and has had policies specifically addressing cell phone use since at least 2007.

Finally, Murphy Oil USA, Inc., 286 NLRB 1039 (1987), cited by the Acting General Counsel to claim that any change in the radio policy was material and substantial, is readily

distinguishable. In Murphy Oil, the Board considered the employer's new rule "banning the use of **all** personal radios." Murphy Oil, 286 NLRB at 1039 (emphasis added). There, the Board concluded that the employer did not "limit itself, in its prohibition of radios . . . to the taking of specific measures tailored to newly arising conditions or to fine-tuning existing rules in order to enforce them more effectively. . . . Instead, the [employer] unilaterally made a broad and sweeping withdrawal of work-related privileges." Id. Such is simply not the case here. Warren Unilube did not make a "broad and sweeping" prohibition against the use of radios; rather, it narrowly tailored its prohibition to apply only to those radios not in office areas that therefore posed a safety risk. (Tr. (Johanyak Test.) at 243-44; (Brown Test.) at 170-71; GC-4.) In addition, in this case, the fact that only five to seven radios were present in the entire facility, which employs over 200 employees, (Tr. (Johanyak Test.) at 244; (Howard Test.) at 120; (Brown Test.) at 141), demonstrates that any change in the radio policy was not material or significant. See Crittenton Hosp., 342 NLRB 686, 686 (2004) (finding that a change in policy was not "material, substantial, and significant" where, among other factors, the General Counsel did not present any evidence that a substantial number of employees would be impacted by the change).

Because any change in policy represented by the November 16, 2010 notice was not material, substantial or significant, Warren Unilube had no obligation to bargain with the Union prior to issuing that notice. The ALJ's conclusion to the contrary should be reversed.

D. Even if Bargaining Was Otherwise Required, the Subject of the Safety-Based November 16, 2010 Notice Was an Illegal Subject of Bargaining.

In disputing that the subject of the safety-based November 16, 2010 notice was an illegal subject of bargaining given Warren Unilube's obligation to provide a workplace free of hazards under the General Duty Clause of the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 654(a)(1), the Acting General Counsel argues that Warren Unilube "had wide-ranging

flexibility and discretion regarding the appropriate manner to address its safety concerns." (Answering Br. at 18.) However, the Acting General Counsel ignores the fact that its own witnesses admitted that the equipment and machinery at the Warren Unilube plant could be dangerous, (Tr. (Howard Test.) at 113-14), "that it's important for employees to be alert and aware when they're around that dangerous equipment and machinery," (Tr. (Howard Test.) at 114; see also (Morris Test.) at 63-65; (Howard Test.) at 114-15), and that it was dangerous for employees to operate or be near automated equipment while using a cell phone. (Tr. (Morris Test.) at 77.) The Acting General Counsel's witnesses also agreed that Warren Unilube's prohibition on telephone calls other than during breaks is a reasonable rule, (Tr. (Morris Test.) at 74; (Howard Test.) at 125), thus implicitly acknowledging that Warren Unilube's rule was the "appropriate manner to address its safety concerns."

Because the November 16, 2010 notice was necessary and (as admitted by the Acting General Counsel's witnesses) reasonable in order for Warren Unilube to comply with OSHA's General Duty Clause, even assuming that Warren Unilube otherwise had a duty to bargain with the Union regarding the November 16, 2010 notice, which Warren Unilube denies, the subject of the safety-based notice was an illegal subject of bargaining. See Eddy Potash, Inc., 331 NLRB 552 (2000); see also Mike O'Connor Chevrolet-Buick-GMC Co., Inc., 209 NLRB 701, 704, 710 (1974). Warren Unilube thus had no duty to bargain with the Union regarding the notice.

II. THE ALJ'S RECOMMENDED "NOTICE TO EMPLOYEES" CONTAINS LANGUAGE DIRECTLY CONTRARY TO THE STIPULATIONS AGREED UPON BY THE PARTIES BEFORE THE HEARING.

Warren Unilube has also submitted that even if the ALJ's Decision is not reversed, the recommended Notice to Employees (the "Notice") contained in that Decision should be amended because it is directly contrary to the parties' pre-hearing stipulations. Specifically, the ALJ's

Decision recommends that Warren Unilube be required to post a Notice that reads, in pertinent part: "WE WILL NOT refuse to bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit." (Decision at Appendix.) This requirement that Warren Unilube state, without limitation, that it will bargain with the Union is contrary to the parties' pre-hearing stipulation in which the parties agreed that issues regarding the propriety of the Union's certification as the bargaining representative (and thus Warren Unilube's general obligation to bargain with the Union) would not be addressed in this case, but would not be waived by Warren Unilube.

The Acting General Counsel states that amendment of the ALJ's Notice

> is not warranted as the Judge made clear that the violations he found in this case 'are contingent upon enforcement of the Board's Order in *Warren Unilube, Inc.*, 357 NLRB No. 9 (2011).' Thus, the Judge has already acknowledged that enforcement of the Order in this case may not be implemented until the United States Court of Appeals for the Eighth Circuit has determined that the Board's Order should be enforced.

(Answering Br. at 19 (internal citations omitted).) The ALJ's Decision, however, is therefore internally inconsistent. While he states that "the violations found herein are contingent upon enforcement of the Board's Order," he required that Warren Unilube post the Notice, including the unlimited agreement to bargain with the Union, within 14 days after service of his Decision. (Decision at 10.) Warren Unilube respectfully requests, therefore, that the Board either amend the Notice to remove the unlimited agreement to bargain, or hold that Warren Unilube is not required to post the Notice (or comply with the other Remedies contained in the Decision) until 14 days after final resolution of Warren Unilube's challenge to the Union's certification, but only in the event that the Union's certification is ultimately upheld.

CONCLUSION

As described herein and in Warren Unilube's Brief, the ALJ erred in concluding that Warren Unilube violated the Act in not bargaining with the Union prior to issuing the November 16, 2010 notice regarding radio and cell phone use. Warren Unilube therefore respectfully submits that the Board should reverse the ALJ's Decision and dismiss the Acting General Counsel's Complaint against Warren Unilube in its entirety.

This the 13th day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for Respondent hereby certifies that a copy of the foregoing Respondent's Reply in Support of Respondent's Exceptions to the Decision of the Administrative Law Judge, which was filed electronically at www.nlrb.gov, was served on the following via United States first class mail and electronic mail:

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This the 13th day of December, 2011.

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